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IN THE

# Supreme Court of the United States

**October Term, 1974.**

No. 74—749.

ART THEATRE GUILD, INC., and SHERPIX, INC.,
*Petitioners,*

*v.*

LARRY E. PARRISH, THOMAS F. TURLEY, JR., *et al.*,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## PETITIONERS' REPLY TO BRIEF OF RESPONDENT, LARRY E. PARRISH.

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York, N. Y. 10016.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, N. Y. 10017.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
First National Bank
Building, Suite 2020,
Memphis, Tenn. 38103,
*Attorneys for Petitioners.*

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In the

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October Term, 1974.

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*Petitioners,*

*v.*

Larry E. Parrish, Thomas F. Turley, Jr., *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

## PETITIONERS' REPLY TO BRIEF OF RESPONDENT, LARRY E. PARRISH.

### Preliminary Statement.

This is a reply to the brief of respondent Larry E. Parrish, Assistant United States Attorney, Western District of Tennessee, appearing *pro se* (hereafter generally "Parrish" or "defendant Parrish"). The respondents collectively shall be referred to as "defendants." The opinion of the Sixth Circuit is reported at 503 F. 2d 133 (6th Cir. 1974) and is reproduced in Appendix A of the petition.

The most *critical issue* is the one which Mr. Parrish attempts to set forth in Question 3 of the Parrish brief, page 3, which covers essentially the same ground contained in Question 1 and Point I-A and Point I-B of

the petition. Mr. Parrish's misdescription of the meaning and consequence of the August 1972 adversary hearing determination of obscenity is exactly the error made by the Sixth Circuit in its adaptation of *Heller v. New York*, 413 U. S. 483 (1973).

The August 1972 adversary hearing determination of obscenity was a *preliminary evidentiary hearing determination authorizing the seizure of one film print for evidentiary purposes based on a standard of probable cause and was not a final judgment* (pet., pp. 8, 9 and Point III-A, *infra*). *It may not justify massive nationwide seizures* (pet., Point I-A and B and Point III-B), especially when defendants were fully protected by the District Court hold subject to subpoena order (pet., Point I-C, Point III-C).

From the outset Mr. Parrish treated the August 1972 preliminary adversary hearing determination as if it were a final judgment of obscenity. On this erroneous basis he urges in his Point III that after the adversary hearing, "there is no right whatever relating to materials judged obscene in an adversary hearing" (Parrish br., p. 21), and hence the nationwide seizures were justified.

Plaintiffs on November 3, 1972, asked the District Court for mandatory injunctive relief ordering a return of the master negative and film prints on the basic grounds here urged. The District Court denied injunctive relief because the adversary hearing was binding on Art Theatre Guild, Inc. (App. C-41), and because plaintiffs had not proved that the seizures were undertaken in bad faith (App. C-41).

But plaintiffs did not and do not have any burden of alleging or proving bad faith as a condition of securing the return of the material. *American News Co. v. Ladas*,

454 F. 2d 1237 at 1240 (6th Cir. 1972); *Cinema Classics, Ltd., v. Busch*, 339 F. Supp. 43, 48, 50 (C. D. Cal. three judge Ct. 1972), aff'd *sub nom. Busch v. Cinema Classics, Ltd.*, 409 U. S. 807 (1972).

*The Sixth Circuit* held, nonetheless (App. A, p. 27, 503 F. 2d at 137), that the District Court had found that Sherpix, Inc., was the owner of the film, that the *adversary determination was binding* on Sherpix and that therefore there was no abuse of discretion in permitting a massive seizure.

The Sixth Circuit notation that the District Court found that the adversary hearing was binding on Sherpix happens to be wrong. The District Court held specifically (App. C, p. 41) that there "is insufficient proof in the record * * * to make the former adversary hearing binding upon Sherpix." But in this case it is immaterial—*the case boils down to what is the meaning and consequence of an adversary hearing?*

The basic error of the Sixth Circuit is its validation of defendants' position and its holding that under *Heller* a preliminary adversary determination of obscenity authorizes a massive seizure for any purpose.

While Mr. Parrish is a very capable attorney the following must also be noted:

On October 6, 1972, the District Court quashed multiple subpoenas for production of the negatives and film prints holding that the criminal conspiracy investigation could not justify suppressing the nationwide distribution (App. A, p. 21). Nonetheless three weeks later Mr. Parrish did by search and seizure exactly that which the District Court held on October 6, 1972, he could not do by subpoena.

Mr. Parrish claims (Parrish br., pp. 7, 8) that the District Court's October 6, 1972 order to hold the material subject to subpoena (App. C, p. 33) was not workable. But defendants took no appeal. Defendants took no steps in the District Court to modify any of the alleged deficiencies even though some of those supposed deficiencies could have been eliminated (Point III-C). Instead Mr. Parrish took the law into his own hands. We submit that is not proper.

In any event defendants claim that the District Court's hold subject order was not workable is completely specious (Point III-C).

## POINT I.

### The District Court plainly had jurisdiction to entertain the action and the power to grant injunctive relief.

### (Reply to Parrish Brief—Point I.)

Defendant Parrish urges that the District Court was without jurisdiction to entertain the action for injunctive relief on the grounds of sovereign immunity. This point was raised by defendants in the Sixth Circuit and while not conclusive the Sixth Circuit obviously rejected it.

The District Court has the clear power to enjoin United States Attorneys and federal agents from violating constitutional rights and to direct the return of material seized in violation of constitutional rights. *Go-Bart Importing Co. v. United States*, 282 U. S. 344 at 354, 355 (1931) (the United States Attorney and the Special Agent in charge are subject to the jurisdiction of the Court and

*id.*, at 358, injunctive relief granted against the United States Attorney directing return of the material and enjoining its use); *Rea v. United States*, 350 U. S. 214 at 217 (1956) (*id.*, at 219, even the dissenters agreed the "federal courts undeniably have the power to issue an injunction in this case"). We note in *Go-Bart* and *Rea* the grant of injunctive relief turned on a violation of constitutional rights, not on a showing of bad faith.

The doctrine of sovereign immunity concerning officers of the executive branch does not apply when the manner in which they are exercising their powers are in violation of constitutional rights. *Dugan v. Rank*, 372 U. S. 609 at 621 (1963); *Malone v. Bowdin*, 369 U. S. 643 at 647 (1962). That certainly includes seizures in violation of First Amendment rights. The relief sought by plaintiffs did not and does not have anything to do with any decree or order running against the sovereign.

Defendant Parrish's brief, page 14, citing *Barr v. Matteo*, 360 U. S. 564 (1959), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971), urges a variant of the sovereign immunity argument, to wit, that officials of the Federal Government have immunity from damage claims.

On November 24, 1972, defendants moved in the District Court to dismiss the complaint and for summary judgment on essentially the same grounds here urged (App. C, p. 35) which motion was argued on March 23, 1973. Judge McRae never ruled on this motion. It is not before this court.

We also note that while bad faith is an issue on a damage claim, United States Attorneys do not have any absolute sovereign immunity even from a damage claim.

But all this has nothing whatsoever to do with the power of the Court to grant injunctive relief.

*Barr* and *Bivens* do not contain any suggestion that inclusion of a damage claim divests the Court of power to grant injunctive relief.

The District Court cited *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971) (App. C, p. 36), for the proposition that jurisdiction is to be exercised with great caution and not, as Mr. Parrish's brief, page 14, contends, because it recognized any tenuous basis for jurisdiction.

Sovereign immunity is no bar to the grant of injunctive relief.

## POINT II.

**The Sixth Circuit correctly held plaintiffs' action was an action independent of the criminal action and correctly refused to dismiss the appeal.**

### (Reply to Parrish Brief—Point II.)

Respondent Parrish urges that the Sixth Circuit was wrong in refusing to dismiss the appeal on the basis of *DiBella v. United States*, 369 U. S. 121 (1962), and supposedly created an unknown exception to *DiBella* and supposedly misapplied *Heller*.

Mr. Parrish has not, however, attempted to distinguish the case law set forth on page 14 of plaintiffs' petition. Where there is a seizure by law enforcement officials of allegedly obscene materials in connection with criminal

prosecutions, but also in violation of the First Amendment rights, the First Amendment gives rise, and *Heller* made it clear it still does give rise, to two separate and independent rights: (i) the independent right to mandatory injunctive relief for a return of the material seized in violation of the First Amendment, and (ii) the application of the exclusionary rule on the criminal prosecution for the violation of the First and Fourth Amendments.

These two rights are and they must be maintained as separate independent rights or otherwise persons and firms exercising First Amendment rights will not be able to have their day in Court to even try to vindicate First Amendment rights. Mr. Parrish's brief makes that plain.

The preliminary adversary hearing of August, 1972, was held pursuant to a May 26, 1972 order to show cause filed as a civil action case entitled *United States of America v. Two Cartons Containing One Motion Picture Film Entitled "School Girl,"* No. C-72-179 (appeal dismissed as an attempt to perfect an interlocutory appeal, CCA No. 72-1972, 6th Cir., May, 1973). This order to show cause is reproduced in Appendix AA of Mr. Parrish's brief, pages 49, 50, and that show cause matter hereafter is called *United States v. School Girl.*

While the propriety of the order to show cause in *United States v. School Girl* and the May 1973 dismissal of the appeal is *not* before this court the disposition thereof demonstrates vividly why, if there is a massive seizure, actions or proceedings by whatever name to vindicate First Amendment rights must be the subject of a separate and independent right or action.

On May 30, 1972, in the District Court Mr. Pleasants raised several objections to the show cause order includ-

ing an objection pertinent to Point III, *infra*, that a probable cause standard with no built-in safeguards could not be applied at the proposed adversary hearing. All objections including a motion for a return of the film print were overruled by the District Court.

An appeal was taken which included objections to a probable cause standard and the obscenity determination. On defendants' motion the Sixth Circuit in May, 1973, dismissed the appeal in *United States v. School Girl* as non-final.

The preliminary adversary hearing ruling that "School Girl" was obscene was issued August 31 (or August 30, 1972) and the present indictment was returned February 15, 1973, about 5-1/2 months later. In the intervening period of time and thereafter defendants treated the adversary hearing ruling as if it was a final judgment authorizing the nationwide seizures. But on the appeal from that ruling defendants persuaded the Sixth Circuit that it was non-final. Thus Mr. Parrish would leave the distributor with no recourse.

Any criminal obscenity case with its potential jail consequences involves multiple considerations in addition to search and seizure. At the same time the criminal obscenity cases often involve mass seizures.

Hence, the case law does and must mandate a return of material as a separate right so as to permit the continued distribution, exhibition, or sale, pending the final adjudication in any criminal prosecution and leaving to the criminal prosecution the application of the exclusionary rule under the First and Fourth Amendments. *Cinema Classics, Ltd., supra*, 339 F. Supp. at 48, 50; *American News Company v. Ladas, supra*, 454 F. 2d at 1240; *Turner, Inc., v. Wilkinson*, 410 F. 2d 639 at 641, n. 4 (4th Cir. 1969); *Heller, supra*, 413 U. S. at 493, n. 11.

*United States v. Peachtree National Distributors*, 456 F. 2d 442 (5th Cir. 1972), cited by Mr. Parrish, does not support his position and really supports the position of plaintiffs. In *Peachtree, supra*, as the Fifth Circuit opinion shows, the District Court at the request of the United States Attorney issued a search warrant for a search of a trailer and a temporary restraining order restraining the disposition of books and magazines in the trailer. The District Court (see 456 F. 2d at 444) issued a finding of fact and law that there was "probable cause to believe that the materials" were obscene, and entered an order that the search warrant be issued and the Government retain the material in its possession for criminal proceedings (*id.*, at 444).

In *Peachtree* the appellants (respondents in the District Court) did not offer testimony, though they were invited to. However, the *Peachtree* proceedings were essentially similar to the order to show cause proceedings in *United States v. School Girl*. There was a hearing to determine whether a search warrant should issue, which was exactly the purpose of the order to show cause in *School Girl*. There was a probable cause determination of obscenity and an order that the material in *Peachtree* be held for the criminal case, which as the District Court opinion in this case shows (App. C, p. 32) was exactly the order entered following the determination that the film "School Girl" was obscene.

*Peachtree, supra*, held that that initial determination was not appealable under *DiBella* just as the Sixth Circuit held that the order in *School Girl* was not an appealable order.

***However, the United States Attorney in the Peachtree case did not take the District Court probable cause determination of obscenity and go all over the country seiz-***

*ing 40 to 50% of all copies of each title of each and every book and magazine which had been "declared obscene" together with the typeset and plates from which the magazine pictures were made.* That is what happened in this case.

The independent character of the proceedings for the purposes of the final judgment rule turn on the reality of the rights being asserted. *Heller* recognized that the right to continue the distribution or exhibition of presumptively protected material until there is a final judicial determination of obscenity is a separate and independent right. Where there is unconstitutional prior restraint, and especially where it is nationwide, actions and proceedings to vindicate First Amendment rights are and must be independent.

*DiBella* does not apply.

## POINT III.

**The preliminary hearing determination of obscenity was an evidentiary hearing, authorizing only an evidentiary seizure based on a standard of probable cause and was not a final judgment. The nationwide seizure of the master negative and the film prints based thereon is a clear First Amendment violation; the Government was adequately protected by the hold subject to subpoena order.**

### (Reply to Parrish Brief—Point III.)

A preliminary evidentiary hearing determination of obscenity authorizing a seizure of one film print based on a standard of probable cause may not, as here, be used to justify nationwide seizures as if it were a final judgment.

**A. The adversary hearing was an evidentiary hearing to authorize an evidentiary seizure, was based on a standard of probable cause and was not a final determination on the merits.**

1. The District Court stated in its December 1, 1972 opinion (App. C, p. 32) that the Court found the film "School Girl" obscene and

> "authorized the seizure of the film with regard to the investigation of a possible violation of 18 U. S. Code §1462."

The District Court opinion could not be plainer. The adversary hearing was an *evidentiary hearing to obtain authorization for an evidentiary seizure.* The hearing did not remotely purport to be a full trial and the determination could not be and was not a final judgment.

2. It is obvious from a reading of the order to show cause that the only standard which could be applied to the adversary hearing of August, 1972, was probable cause. The order to show cause (Parrish br., App. AA, p. 49) directed that whoever had possession of the film show cause why it "should not be declared obscene and a *search warrant executed* authorizing the seizure" of the film and (pp. 50, 51) "why said motion picture film should not be subject to *execution* of a search warrant." (Italics supplied.)

Search warrant issuances are governed by F. R. Crim. P. 41(c). As plaintiffs' main brief, page 9 stated, F. R. Crim. P. 41(c) provides that the test is probable cause. The adversary hearing was initiated by an order to show cause which sought authority to execute a search warrant. *The test for the issuance of a search warrant is probable cause* and the adversary hearing proceeded on the basis of a standard of *probable cause.*

3. On November 3, 1972, plaintiffs filed their motion for a preliminary injunction accompanied by a twelve (12) page November 2, 1972 affirmation of Ralph J. Schwarz, Jr.

The Schwarz November 2, 1972 affirmation (p. 2, bottom, and p. 3) stated:

> "The defendant's position as a matter of law is very plain. Defendant Parrish believes that the August 31, 1972 decision of this court *on preliminary probable cause determination hearing* entitle the defendants to obtain a search warrant and seizure authorization from every federal magistrate in every city of the country authorizing seizure of the prints and negatives of the motion picture even though, it may be added as stated that the magistrates in the different parts of the country have never even seen the picture." (Italics supplied.)

The Schwarz November 2, 1972 affirmation (p. 4) continued:

> "Defendant Parrish has absolutely no right to deprive the citizens of Los Angeles or New York or any other city of their right to see the motion picture because of a determination of obscenity in this court even if it had been after final trial. *Defendant Parrish surely has no such right based only on probable cause preliminary adversary determination in one court.*" (Italics supplied.)

*Defendants did not and do not question that the standard at the adversary hearing was probable cause. The District Court and the Sixth Circuit did not question that the standard actually applied at the preliminary hearing was probable cause.*

4. After the first film print was brought to the District Court under the compulsion of the order to show cause, Mr. Pleasants on May 30, 1972, appeared in the *United States v. School Girl* case and objected* to the proposed proceedings on the ground *inter alia* that the standard was probable cause and there were no statutory built-in safeguards. The motion was denied and, as stated, defendants successfully blocked any appeal.

5. As plaintiffs' petition stated (pp. 8 and 9), the decisions pre-*Heller* held that an adversary hearing was required for an evidentiary seizure of one copy of a film print. But the standard on the adversary hearing was probable cause. *Perial Amusement Corp. v. Morse*, 482 F. 2d 515, at 523 (2d Cir. June 1, 1973). See also, *Tyrone, Inc., supra*, 410 F. 2d at 641; adversary hearing not fully matured action at law; *Peachtree National Distributors, supra*, 456 F. 2d at 444.

**B. There can be no suppression of a film until there is a final judgment after a full trial.**

A standard of probable cause at an adversary hearing for a limited evidentiary seizure is one thing, *but a standard of probable cause may not be used under A Quantity of Books v. Kansas, 378 U. S. 205 (1964), to massive seizure which completely halts the nationwide distribution and exhibition of a motion picture film.*

As plaintiffs' petition stated, page 8, *Heller, supra*, 413 U. S. at 489, repeatedly cites *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), and *Freedman v. Maryland*, 380 U. S. 51 at 58, 59 (1965), and indeed in footnote 5 (413 U. S. at 489, n. 5) requotes *Freedman*

*We note there is no jurisdictional base for these show cause proceedings and while some courts have upheld them they have erred in doing so by inventing jurisdiction.

emphasizing that there cannot be any substantial restraint in advance of "a final judicial determination on the merits."

We add that *Heller* went on to point out that "Blue Movie" was held obscene following "a fully adversary trial" (413 U. S. at 490). *That fully adversary trial was the actual trial not a preliminary hearing. Paris Adult Theatre I v. Slaton*, 413 U. S. 49 at 55 (1973), held there could be "no restraint * * * until after a full adversary proceeding and a *final* judicial determination." (Italics supplied.)

The defendants' position validated by the Sixth Circuit was and is that after the adversary hearing determination "there exists no further rights under the First Amendment" and a seizure is permissible, no matter how massive, based on a preliminary evidentiary probable cause determination of obscenity.

We respectfully submit that that is completely wrong.

### C. The direction to hold subject to subpoena adequately protected the Government.

The District Court October 6, 1972 ruling concerning the obligation of the firms and persons subpoenaed to retain in their actual or constructive possession prints and negatives and not to alter them and to keep a complete record of their whereabouts is set forth in the District Court opinion (App. C, p. 33). That October 6, 1972 ruling is referred to in the petition and this reply brief as the hold subject to subpoena order. Mr. Parrish's contention that these restrictions were unenforceable and unworkable (Parrish br., p. 8) is, we respectfully submit, completely specious.

No circumstances were changed between the October 6, 1972 ruling of the District Court and October 31, 1972, the date that the nationwide seizure commenced three weeks later. If the defendants had attempted in any fashion to follow and implement the October 6, 1972 ruling of the District Court instead of taking the law into their own hands they would have had no difficulty in obtaining the evidence by obviously less intrusive means.

The complaint (par. 11) alleged that Movielab, Inc., which held the master negative and a subdistributor and eight theatres among others had been served with subpoenas to produce the film material. Mr. Parrish (br., p. 8) states that since plaintiffs had not been served with the subpoenas it is therefore supposedly "difficult to conceive how anything done by the district court" with reference to the parties who were served could bind them.

Mr. Parrish is a very bright lawyer but the contention is absurd. A person or firm served with a subpoena is bound by the subpoena. It is obvious that the non-production of the film material by the firms actually served with the subpoenas was conditioned upon their compliance with the court ruling of October 6, 1972. If defendants had any doubt whatsoever as to whether these firms served with the subpoenas were bound by the October 6 1972 ruling the defendants could have asked the District Court for an order which would direct the persons served to appear in Tennessee unless they agreed to be bound by the terms of the court's October 6, 1972 ruling. The defendant did not do so because they were not interested in obtaining the evidence by the less intrusive means.

The defendants could have asked the District Court to make that or any other reasonable ruling for orderly scheduling of grand jury appearances.

Mr. Parrish then states that the parties subpoenaed, even assuming them bound, could allegedly "send the film to their wife * * * (thus) the chain of possession is (allegedly) lost."

But the court directed that the persons served keep the material in their constructive possession. Sending a print to one's wife who thereafter just ships it out to a third party is a patent sham. One of the exhibitors subpoenaed was Trans-Lux Theatre in Washington, D. C., 1,000 miles from Memphis; another was in California. There is no motive, reason, or gain for Trans-Lux or any exhibitor to become embroiled in contempt of court charges and obstruction of justice charges to benefit the distributor over one film print.

Mr. Parrish's brief (p. 8) then states that the District Court order would require persons "to provide incriminating evidence against them" and thus suggests without explicitly stating that the District Court order would be disobeyed because it violated self-incriminatory rights of the person subpoenaed. This solicitous concern for self-incrimination rights* however did not deter defendants in September, 1972, from serving the subpoenas in the first place. Passing for the moment the extent to which the corporations may or may not have self-incrimination rights where directed to produce films, it is also not unheard of to grant immunity.

Mr. Parrish's brief (p. 11) states that "to say the least" the seized prints represent not only violations of Sec-

*The only self-incrimination rights were those of firms which were compelled by the show cause order to incriminate themselves as a condition of exercising First Amendment rights which emphasized the lack of jurisdiction of the show cause order. However, that is not involved in this case.

tion 1462 but local violations throughout the country, and a return would allegedly "make impossible" prosecutions in other jurisdictions. This is a demonstration that defendants did not seize the material just for the investigation in Tennessee.

In closing we especially note that proof of interstate shipment did not require continuous possession of the negative, film prints and the containers.

The defendants were amply protected by the hold subject to subpoena order of the District Court.

## POINT IV.

**18 U.S.C. 371 is overbroad as applied to justify the seizure of the negative and film prints throughout the country.**

### (Reply to Parrish Brief—Point IV.)

**A. The overbreadth of 18 U.S.C. 371 as applied to justify seizures is properly before this court as a First Amendment procedural question.**

Mr. Parrish has framed his question 4 as follows (we paraphrase): Is 18 U. S. C. 371 facially or as applied unconstitutional so as to prohibit a conspiracy indictment charging distribution of obscene material throughout the United States?

Plaintiffs' petition Point II claims that 18 U. S. C. 371 as applied to justify seizures is overbroad. That question we submit is properly before this Court as a First Amendment procedural due process question. We

do not agree that the question must be cast as Mr. Parrish framed it.

Concededly, 18 U. S. C. 371 is not a seizure statute. But 18 U. S. C. 371 was the essential base when used and applied in connection with F. R. Crim. P. 41(e) to justify the seizures.

A preliminary hearing on a standard of probable cause was held to establish the right of the defendants to subject the film print to the execution of the search warrant. This was the application of a *procedural* rule for the purposes of establishing the right to seize one film print. **Defendants received the right to execute a search warrant to seize the print and then entered a "judgment."** Defendants thus used criminal procedural rules, and a "judgment" entered thereon in connection with 18 U. S. C. 371 as if it were a final judgment to justify nationwide seizures. While the film material has not been burned, that judgment completely blocked distribution for a long period of time. It is thus no different than the judgment in *Marcus v. Search Warrant*, 367 U. S. 717 (1961).

Statutes and Federal Rules used and applied to effectuate seizures of presumptively protected material by means which sweep too broadly violate procedural due process and the First Amendment. *Marcus, supra*, 367 U. S. at 733, 738.

*The petition Point II procedural First Amendment seizure question is therefore properly before this Court particularly since the Sixth Circuit relied in part on Hamling v. United States,* U. S. , 41 L. Ed. 2d 590 (1974), to *sustain nationwide seizures.*

Plaintiffs certainly believe that 18 U. S. C. 371 is facially and as applied overbroad and hence insufficient to support the conspiracy count of the indictment (a substantive law issue—Point IV-C, *infra*). Obviously, the arguments concerning indictment overbreadth and seizure overlap but the Court need not reach the substantive law issue in order to agree with plaintiffs' petition seizure Point II.*

**B. 18 U.S.C. 371 as applied is overbroad to justify nationwide seizures and treat films as contraband and Mr. Parrish's own arguments confirm this.**

The essence of the local community standard rule in the application of *Miller* test (a) and test (b) 413 U. S. 15 at 30-34 (1973) (herein called the local community standard rule or test) certainly makes it very clear that no *one* federal judge in one district may by a *preliminary* determination and "judgment" of obscenity authorize seizures of film throughout the United States and stop every adult from seeing the film.

That is a clear First Amendment violation and the new local standards rule emphasizes that First Amendment violation (Petition, Point II).

Mr. Parrish's brief (p. 23), states that the *Miller*, *Paris* and substantive law cases decided by this Court in June, 1973, show "an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct," and the Parrish brief (pp. 26, 27 and 29), quoting from *United States v. Orito*, 413 U. S. 139 at 143 (1973), and citing *United States v. 12-200 Ft. Reels*, 413 U. S. 123 at 130, n. 7 (1973), emphasizes that the Government has

*Plaintiffs' petition Point II furnishes an additional reason for a return of the material: it is an issue which is not part of the criminal case.

an interest in preventing obscene material from *entering* the stream of commerce. (Italics that of Mr. Parrish.)

Mr. Parrish's reliance on the June, 1973, *Miller, et al.*, substantive law cases that this Court has shown "an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct" *has absolutely nothing to do with the seizure point.*

*Heller, supra*, and *Roaden v. Kentucky*, 413 U. S. 496 (1973), continued the *Marcus, supra*, holding that for purposes of search and seizure presumptively protected material could not be equated with contraband. The Court may have shown an inclination to treat criminal obscenity like any other offense, *but not in the area of seizures.*

Even a final judgment of obscenity in Tennessee would not permit defendants to seize film prints as contraband throughout the country and stop, for example, citizens of San Francisco from seeing the film. If that is not so then the local community standards rule has no meaning.

Defendants surely do not have the right to use a preliminary "judgment" in Tennessee as the basis for seizing the film in San Francisco and every other community in the country, especially not in the light of a local community standards rule.

18 U. S. C. 371 as applied to justify seizures is overbroad.

**C. 18 U.S.C. 371 is both overbroad and unduly vague as applied on a substantive as well as a procedural law basis.**

18 U. S. C. 371 as applied is both overbroad, and unduly vague in the sense that there is no standard at all, and Mr. Parrish's detailed argument confirms this.

For convenience in reading this reply we attempt to summarize Mr. Parrish's argument concerning the meaning of *Hamling*, *supra*, and *Jenkins v. Georgia*, U. S. , 41 L. Ed. 2d 642 (1974).

Mr. Parrish says that *Hamling* and *Miller* and *Jenkins* did not hold that a precise geographical area is required (Parrish br., pp. 30, 31); that never is it required that the word "community" be considered in geographical terms (Parrish br., p. 32); that therefore it is allegedly "*immaterial* what is the proper means of expression by a local community as to what, if any, standards it (the local community) has concerning obscenity" (Parrish br., p. 33) (italics ours; parentheses supplied) because Congress under its commerce power has prohibited obscenity from entering the stream of commerce (Parrish br., pp. 33, 34, 35); that geographical considerations in community standards play no greater role than they do in the reasonable-person test in a civil tort suit (Parrish br., pp. 41, 42); that "the word 'community,' when used in the phrase 'contemporary community standards' is (allegedly) a superfluous relic which is confusing to the public at large, the judiciary and the bar" (Parrish br., p. 44) (parentheses supplied), and the nationwide seizures were appropriate and the conspiracy indictment count sufficient.

The conclusion which Mr. Parrish urges is completely at odds with the specific holding of *Miller*, and the First Amendment meaning of community standards for over fifty years before, under, and after a national standards rule. Under the First Amendment a community standards rule involves what the community accepts and tolerates, and what it finds objectionable, it involves change, it involves *diversity* of attitudes between different States and areas as to *what the particular community finds acceptable concerning depictions of sexual matters in terms of the needs, moral attitudes, beliefs, tastes, general welfare of the particular community where the material is exhibited or distributed. United States v. Kenworthy*, 209 F. 119 at 121 (S.D.N.Y. 1913); *Miller*, *supra*, 413 U. S. at 33; *Jacobellis v. Ohio*, 378 U. S. 184 at 200-201 (1964), dissenting opinion of former Chief Justice Warren quoted with *emphatic* approval on the community standards rule in *both Miller* and *Hamling*; *Cain v. Kentucky*, 397 U. S. 319, 319-320 (1970) (dissenting opinion of Chief Justice Burger cited with approval in *Miller*, *id.* at 33); *Roth v. United States*, 354 U. S. 476 at 505-506 (1957), concurring and dissenting opinion of Mr. Justice Harlan cited with approval in *Miller*, *id.* at 33. This is the essential guideline in the application of the local community standards rule.

The power of Congress to regulate the flow of obscene material is not at issue but rather whether that power is being exercised in conformity with the First Amendment. One basic premise underlying the exercise of that power in the area of obscenity specifically relied on in *Orito*, *supra*, 413 U. S. at 144, n. 6, citing *inter alia Brooks v. United States*, 267 U. S. 432, 436-437 (1925), and *Weber v. Freed*, 239 U. S. 325 (1915), is the Congressional power to control interstate shipments for exhibition into a par-

lucian State "*because of the demoralizing effect of such exhibition in the State of destination*, and *Orito, id.* at 144, n. 6, to stop immorality in the state where distribution occurs.

What Mr. Parrish is urging upon this Court is completely incompatible with the First Amendment application of the local community standards rule and makes it clear that 18 U. S. C. 371 as applied is both overbroad and unduly vague in the sense that there is no standard at all.

The essential conclusion which Mr. Parrish urges is to be found in the example that Mr. Parrish gives on pages 36-37 of his brief. For according to Mr. Parrish if the legislative bodies of Maine and New Hampshire abolish all consenting adult obscenity laws it is immaterial with reference to interstate shipments between those States. Furthermore, if a regional subdistributor and two exhibitors ship a film between Maine and New Hampshire and have absolutely nothing to do with any shipment into Tennessee or an agreement to ship to Tennessee, nonetheless according to Mr. Parrish, those parties can be indicted in Tennessee for a conspiracy because the same film was distributed nationwide and also in Tennessee. Though the names of the States may be different that is exactly what happened in this case.

Let us assume, as Mr. Parrish does, that Maine and New Hampshire abolish all obscenity laws. Let us further assume for the sake of demonstrating our legal argument that every adult in both States certifies to the legislative body (i) that they have examined sexually explicit material and find as a matter of fact that no depiction of sexually-oriented material is patently offensive, and (ii) that they have read the 1913 decision of Judge Learned

Hand in *United States v. Kennerley, supra*, 209 F. at 121, and that their communities have determined that the "critical point in the compromise between candor and shame" (*id.* at 121, Judge Hand) at which *their* communities have presently arrived at is that no depictions are "shocking to the public taste" and in *their "development* of general notions of what is decent" (*id.* at 121, italics supplied) they elect to eliminate all obscenity laws.

Nonetheless according to Mr. Parrish the citizens of Maine and New Hampshire can be indicted and convicted in Memphis, Tennessee by a Memphis jury for what those citizens exhibited in Maine and New Hampshire, not for what they did in Tennessee.

This is completely contrary not only to Judge Hand's decision in *Kennerley*, but to *Miller* and the entire line of cases that *Miller* relied on in rejecting a national community standards rule.

While our example of every citizen certifying, etc., will not happen the diversity was and is present. There is no enforcement in certain local areas, obviously by choice, and North Carolina, for example, by new statute bans only actual depictions of sexual acts and does not try to regulate simulated depictions.

We turn to one of the First Amendment essentials of community standard rule, the *diversity of different communities* (State or lesser area) *in determining what is acceptable.*

*Miller* said, 413 U. S. at 33:

> *"People in different States vary in their tastes and attitudes,* and this *diversity is not to be strangled by the absolutism of imposed uniformity."*

Both *Miller* and *Manuel*, 41 L. Ed. 2d at 614, cited with emphatic approval and quoted from the dissenting opinion of Mr. Justice Warren in *Jacobellis*, *supra*, 378 U. S. at 200-201. The former Chief Justice said:

> "But communities throughout the Nation are in fact diverse * * * in cases such as this one (i. e., obscenity cases) the Court *is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.*" (Parentheses and italics supplied.)

In *Cain v. Kentucky*, *supra*, 397 U. S. 319, Chief Justice Burger said:

> "In my view we should not inflexibly deny to each of the *States* the power to adopt and enforce its *own standards as to obscenity* and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken."

*Miller*, 413 U. S. at 33, also *cites with approval* the concurring and dissenting opinion of Mr. Justice Harlan in *Roth*, *supra*, 354 U. S. at 505-506.

Mr. Justice Harlan said with reference to the federal obscenity statute: "Different States will have *different attitudes*" (*id.* at 505); there is no overwhelming danger "*so long as other States are free to experiment*" (*id.* at 506); however, with federal control there is danger that "*the prerogatives of the States to differ on their ideas of morality will be destroyed*" (*id.* at 506); and their ability to experiment stunted (*id.* at 506). (Italics supplied.)

*United States v. 12 200-Ft. Reels, supra*, held (413 U. S. at 129, 130) that the standards for testing the constitutionality of State legislation "*are applicable* to federal legislation," not the other way around.

Mr. Parrish's analogy of obscenity laws to gambling laws and other federal criminal offenses is completely off the mark in a First Amendment obscenity case. In obscenity, in the application of old and new test (a) and (b), evidence that other similar material is sold and accepted* is an essential element of whether the particular material before the Court is obscene. *In no other crime that we know of does guilt as a matter of fact, or law, turn on what other people do or what is accepted.*

If a local speeding law is 55 miles per hour it is immaterial that the community tolerates and accepts 65 miles per hour. As a matter of law the fact of 65 miles an hour acceptance is irrelevant. In the community standards test what everyone accepts is the First Amendment *sine qua non* of the application of the community standards rule.

Even in negligence cases, with its reasonable or ordinarily-prudent-man test, usage and custom no matter how long continued do not justify negligence. The standard of care for the reasonable man may be higher than that which everybody follows, 57 Am. Jur. 2d, Negligence, Section 78. That is not so in the application of the community standards rule. And negligence cases do not involve either jail or the First Amendment.

The essence of the local community standards rule involves (i) diversity among different communities and (ii)

*Defendant must show reasonable degree of actual acceptance.

the fact that the obscenity is to be tested by the standards of that particular community. On that basis alone 18 U. S. C. 371 as applied is patently overbroad. That conclusion is fortified by one of the policy reasons set forth in *Orito, supra*, 413 U. S. at 144, n. 6, for the exercise of federal power.

Furthermore, the standard Mr. Parrish urges is no standard at all and hence is also unduly vague. *See Smith v. Goguen*, 415 U. S. 566 at 573 (1974).

*Jenkins, supra*, 41 L. Ed. 2d at 648, held it is "constitutionally permissible to permit juries to rely on the understanding of the community from which they came," acc'd *Hamling*, 41 L. Ed. 2d at 613, "to permit a juror * * * to draw on knowledge of the community * * * from which he comes," to avoid (*id.* at 614) merely personal opinion.

According to the Parrish brief (p. 40), this will be accomplished without any reference to any area because of our "highly mobile society." On that premise this Court might as well re-adopt a national standards rule. It is totally unrealistic and completely unsound to expect that a Memphis jury could know or apply standards of fifty different States.

*Hamling, id.* at 614, said that a District Court would be "at liberty to admit evidence of standards existing" in some place outside the particular district of trial if helpful. But that statement was made in the context of that case and had reference to *defense* evidence. The Government has no burden of proving what the local standards are. *Paris Adult Theatre I v. Slaton, supra*, 413 U. S. at 56. So a prima facie case goes to a Memphis jury

who are supposed to know and apply the standards of 50 states and 195 communities. *That is no standard at all.*

*Hamling* and *Jenkins*, *supra*, were answering the particular issues before the Court. We submit those cases may not be read to permit a formulation, guideline or indictment which is contrary to the purpose and meaning of the local community standards rule and totally eliminates it.

Mr. Parrish urges that the word community insofar as it connotes any geographical area is confusing to the bar and to the public and gives fodder to defense counsel.

We suggest that while a state may not be required to define a specific geographical area virtually everybody, lawyers, law enforcement officials, judges and the average citizen have interpreted this Court's decision as turning control back to the local areas. There is no confusion in applying that rule in a federal case. Everybody understands it. "It makes sense that if the material is acceptable in a particular community that it is acceptable in terms of interstate shipment." Such a rule would promote much greater clarity and guidance for everyone concerned than the nonstandard which Mr. Parrish urges upon this Court.

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*It may be noted that before *Miller* a bill was introduced in Congress (S-193rd Congress) which made the federal statute turn directly on whether the material was patently offensive in a place where shown. While this bill has not been acted on it certainly indicates that someone in Congress does not view the matter of local control as engendering confusion as Mr. Parrish claims, and the Court may consider the wise holding of Mr. Justice Harlan in *Manual Enterprises, Inc., v. Day*, 370 U. S. 478 at 488 (1962), that a community standards test cannot be applied without first deciding the relevant community.

What plaintiffs urge is consistent with the First Amendment and federal control and does justice to both.

18 U. S. C. 371 is both overbroad and unduly vague as applied to the conspiracy count of the indictment and it should be dismissed.

## CONCLUSION.

**The writ of certiorari should be granted.**

Respectfully submitted.

Ralph J. Schwarz, Jr.
22 East 40th Street,
New York, N. Y. 10016
(212) MU 6-8160.

Ephraim C. Granger, Jr.
501 Fifth Avenue,
New York, N. Y. 10017
(212) 697-2710.

Ferguson M. Graves, Jr., and Michael F. Pleasants,
2020 First National Bank Building,
Memphis, Tenn. 38103
(901) 525-8231.

Attorneys for Petitioners.